DEROLPH ET AL., APPELLANTS, V. THE STATE OF OHIO ET AL., APPELLEES.

[Cite as *DeRolph v. State* (1997), ___ Ohio St.3d ___.]

Constitutional law -- Education -- Schools -- Ohio's elementary and secondary public school financing system violates Section 2, Article vI of the Ohio Constitution -- Specific school funding statutes that are unconstitutional.

Ohio's elementary and secondary public school financing system violates Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state. The following specific provisions are unconstitutional:

(a) R.C. 133.301, granting borrowing authority to school districts;

(b) R.C. 3313.483, 3313.487, 3313.488, 3313.489, and 3313.4810, the emergency school assistance loan provisions;

(c) R.C. 3317.01, 3317.02, 3317.022, 3317.023, 3317.024, 3317.04, 3317.05, 3317.051 and 3317.052, the School Foundation Program;

(d) R.C. Chapter 3318, the Classroom Facilities Act, to the extent that it is underfunded.

(No. 95-2066 -- Submitted September 10, 1996 -- Decided March 24, 1997.)

APPEAL from the Court of Appeals for Perry County, No. 94-CA-477.

The constitutionality of Ohio's public elementary and secondary school finance system is at issue in this case. The named plaintiffs-appellants are the Youngstown City School District Board of Education, Mahoning County; the Lima City School District Board of Education, Allen County; the Dawson-Bryant Local School District Board of Education, Lawrence County; the Northern Local School District Board of Education, Perry County; the Southern Local School District Board of Education, Perry County; and the superintendents and certain named members of the boards of education of these districts, as well as certain teachers, pupils and next friends. Numerous organizations representing such diverse groups as teachers' unions, administrators, school boards, and handicapped children, and various legislators, as well as the American Civil Liberties Union and the Ohio AFL-CIO, have filed *amicus curiae* briefs on behalf of the appellants.

The defendants-appellees are the state of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education. The Alliance for Adequate School Funding, Stanley Aronoff,

JoAnn Davidson, and Governor George Voinovich have filed *amicus curiae* briefs on behalf of the appellees.

PROCEDURAL HISTORY

On December 19, 1991, appellants filed a complaint for declaratory and injunctive relief in the Court of Common Pleas of Perry County, seeking a determination that Ohio's system of funding public education is unconstitutional. Trial began on October 25, 1993 and lasted thirty days, culminating in more than five thousand six hundred pages of transcript and the admission of approximately four hundred fifty exhibits into evidence. Sixty-one witnesses testified at trial or by way of sworn deposition. Although the parties disagree over the constitutionality of the relevant statutes, plaintiff and defense witnesses alike testified as to the inadequacies of Ohio's system of school funding and the need for reform. In fact, defendant State Board of Education has not only advocated comprehensive reform but has stated the following three goals of such reform: equity, adequacy and reliability of school funding.

Following trial, the trial court issued extensive findings of fact and conclusions of law. The court determined that Ohio's system of school funding violates numerous provisions of the Ohio Constitution, including Section 2, Article VI, requiring a thorough and efficient system of common schools throughout the state. The trial court ordered the Superintendent of Public Instruction and the State Board of Education to prepare legislative proposals for submission to the General Assembly to eliminate wealth-based disparities among Ohio's public school districts. The trial court retained jurisdiction in the matter only for a period of time to ensure that the order was followed and that appropriate steps were taken to institute a totally new system of school funding. The trial court also awarded costs and attorney fees to appellants.

The State Board of Education voted not to appeal from the trial court's decision. However, the Ohio Attorney General filed a notice of appeal to the Fifth District Court of Appeals. The court of appeals, in a split decision, reversed the trial court. The majority relied on *Cincinnati School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, and found that the current system of school funding is constitutional. The court

also determined that the trial court had erred in awarding attorney fees to appellants and in retaining jurisdiction in the case.

In his concurring opinion, Judge Reader conceded that current school funding was insufficient, but was unwilling to find the statutory scheme unconstitutional. Instead, he stated that it is up to this court to declare the current system unconstitutional and for the General Assembly to repair it. Despite this position, Judge Reader emphasized the peculiar nature of this case and the lack of dispute over the evidence:

"*** The defendants, the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education in their appellate brief indicated that there are few facts in dispute. Of course, there aren't -- they agreed with almost everything the [plaintiffs] stated. In fact, an examination of testimony by defense witnesses in this case would indicate that these witnesses stated that the system of funding was immoral and inequitable. If there was ever a case where the parties acted more in concert than this one, I haven't seen it. *** Further, it is a matter of public

record that the appellants, having previously indicated their satisfaction with the trial court's decision, were literally forced to appeal the ruling."

Judge Gwin, in his dissenting opinion, agreed with the trial court that Ohio's statutory scheme for financing its schools violates the "thorough and efficient" clause of the Ohio Constitution. He stressed that due to the glaring discrepancies in school buildings, facilities, access to technology and curriculum, some students within the state are being deprived of educational opportunity. Furthermore, Judge Gwin stated that the state had shirked its duty to generate revenue for the schools by underfunding Ohio schools and by permitting schools to borrow against future revenue. He also criticized the majority for disregarding certain findings of fact by the trial court and for essentially conducting a *de novo* review. Judge Gwin found that the trial court had not abused its discretion in awarding attorney fees to plaintiffs.

The cause is now before this court pursuant to the allowance of a discretionary appeal.

Bricker & Eckler, Nicholas A. Pittner, John F. Birath, Jr., Sue W. Yount, Michael D. Smith and *Susan B. Greenberger,* for appellants.

Betty D. Montgomery, Attorney General; *Jeffrey S. Sutton,* State Solicitor; *Christopher M. Culley* and *Sharon A. Jennings,* Assistant Attorneys General, for appellees.

Dinsmore & Shohl, Lawrence A. Kane, Jr., Mark A. VanderLaan, Joel S. Taylor, David K. Mullen and *William M. Mattes,* Special Counsel for appellees State Superintendent of Public Instruction and State Department of Education.

Ben Espy Co., L.P.A., and *Ben E. Espy; Jan Michael Long,* urging reversal for *amici curiae* members of the Ohio House of Representatives Mary Abel, John Bender, Ross Boggs, Dan Brady, Samuel Britton, Jack Cera, Jack Ford, Robert Hagan, David Hartley, William Healy, Troy Lee James, Jerry Krupinski, Lloyd Lewis, Jr., Sean Logan, June Lucas, Mark Mallory, Dan Metelsky, William Ogg, Darrell Opfer, C.J. Prentiss, Tom Roberts, Frank Sawyer, Michael Shoemaker, Betty Sutton, Vernon Sykes, and Charleta Tavares; Ohio Senators Robert Boggs, Robert Burch, James Carnes, Ben Espy, Linda Furney, Leigh Herington, Jeffrey Johnson, Anthony Latell, Jan Michael

Long, Rhine McLin, and Alan Zaleski; and U.S. Representatives Louis Stokes, Robert Ney, and Frank Cremeans.

Joan M. Englund, urging reversal for *amicus curiae* American Civil Liberties Union of Ohio Foundation, Inc.

Means, Bichimer, Burkholder & Baker Co., L.P.A., and *Kimball H. Carey,* urging reversal for *amici curiae* Buckeye Association of School Administrators, Ohio School Boards Association and Ohio Association of School Business Officials.

James A. Ciocia, urging reversal for *amicus curiae* Cleveland Teachers Union.

Spieth, Bell, McCurdy & Newell Co., L.P.A., and *Frederick I. Taft,* urging reversal for *amici curiae* Coalition for School Funding Reform (Bay Village City School District, Cleveland Heights-University Heights City School District, Lakewood City School District, and Shaker Heights City School District).

Patrick F. Timmins, Jr., urging reversal for *amicus curiae* Coalition of Rural and Appalachian Schools.

David Goldberger and *Edward B. Foley*, urging reversal for *amicus curiae* Institute for Democracy in Education.

Goldstein & Roloff and *Morris L. Hawk*, urging reversal for *amici curiae* Ohio Association of Elementary School Administrators and Ohio Association of Secondary School Administrators.

Buckley, King & Bluso, Robert J. Walter and *Thomas C. Drabick, Jr.*, urging reversal for *amicus curiae* Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4, AFL-CIO.

Stewart Jaffy & Associates Co., L.P.A., Stewart R. Jaffy and *Marc J. Jaffy*, urging reversal for *amicus curiae* Ohio AFL-CIO.

Schnorf & Schnorf Co., L.P.A., David M. Schnorf and *Johna M. Bella*, urging reversal for *amicus curiae* Ohio Federation of Teachers.

Susan G. Tobin, urging reversal for *amici curiae* Ohio Legal Rights Service and Ohio Coalition for the Education of Children with Disabilities.

Berry, Shoemaker & Clark and *Kevin Shoemaker*, urging reversal for *amicus curiae* Ohio Professional Staff Union.

Chester, Willcox & Saxbe, John J. Chester and *Donald C. Brey*, urging affirmance for *amicus curiae* Governor George Voinovich.

Benesch, Friedlander, Coplan & Aronoff, P.L.L., and *N. Victor Goodman*, urging affirmance for *amici curiae* Stanley J. Aronoff, President of the Ohio Senate, and JoAnn Davidson, Speaker of the Ohio House of Representatives.

Walter & Haverfield and *James E. Betts*, urging affirmance for *amicus curiae* Alliance for Adequate School Funding.

FRANCIS E. SWEENEY, SR., J. In 1802, when our forefathers convened to write our state Constitution, they carried within them a deep-seated belief that liberty and individual opportunity could be preserved only by educating Ohio's citizens. These ideals, which spurred the War of Independence, were so important that education was made part of our first Bill of Rights. Section 3, Article VIII of the Ohio Constitution of 1802. Beginning in 1851, our Constitution has required the General Assembly to provide enough funding to

secure a “thorough and efficient system of common schools throughout the State.”

Over the last two centuries, the education of our citizenry has been deemed vital to our democratic society and to our progress as a state. Education is essential to preparing our youth to be productive members of our society, with the skills and knowledge necessary to compete in the modern world. In fact, the mission statement of defendant, Ohio State Board of Education, echoes these concerns:

“The mission of education is to prepare students of all ages to meet, to the best of their abilities, the academic, social, civic, and employment needs of the twenty-first century, by providing high-quality programs that emphasize the lifelong skills necessary to continue learning, communicate clearly, solve problems, use information and technology effectively, and enjoy productive employment.” State Board of Education, Preparing Ohio Schools for the 21st Century, Sept. 1990, ii.

Today, Ohio stands at a crossroads. We must decide whether the promise of providing to our youth a free, public elementary and secondary

education in a "thorough and efficient system" has been fulfilled. The importance of this case cannot be overestimated. It involves a wholesale constitutional attack on Ohio's system of funding public elementary and secondary education. Practically every Ohioan will be affected by our decision: the 1.8 million children in public schools and every taxpayer in the state. For the 1.8 million children involved, this case is about the opportunity to compete and succeed.

Upon a full consideration of the record and in analyzing the pertinent constitutional provision, we can reach but one conclusion: the current legislation fails to provide for a thorough and efficient system of common schools, in violation of Section 2, Article VI of the Ohio Constitution.

In reaching this conclusion, we dismiss as unfounded any suggestion that the problems presented by this case should be left for the General Assembly to resolve. This case involves questions of public or great general interest over which this court has jurisdiction. Section 2(B)(2)(d), Article IV of the Ohio Constitution.

Under the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional. *Marbury v. Madison* (1803), 5. U.S. (1 Cranch) 137, 2 L.Ed. 60. We are aware that the General Assembly has the responsibility to enact legislation and that such legislation is presumptively valid. R.C. 1.47(A); *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 361, 653 N.E.2d 212, 214. However, this does not mean that we may turn a deaf ear to any challenge to laws passed by the General Assembly. The presumption that laws are constitutional is rebuttable. *Id.* The judiciary was created as part of a system of checks and balances. We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly.

We quote, with approval, the Texas Supreme Court's remarks when it addressed a similar challenge to its authority to review its state's school funding system:

"'[W]e have not been unmindful of the magnitude of the principles involved, and the respect due to the popular branch of the government. *** Fortunately, however, for the people, the function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline. *** [We] cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution; [we] cannot pass it by because it is doubtful; with whatever doubt, with whatever difficulties a case may be attended, [we] must decide it, when it arises in judgment.'" *Edgewood Indep. School Dist. v. Kirby* (1989), 777 S.W.2d 391, 394, quoting *Morton v. Gordon* (Republic of Tex.1841), Dallam 396, 397-398.

Therefore, we are clearly within our constitutional authority in reviewing this matter and in declaring Ohio's school financing system unconstitutional. We turn now to a review of the record.

OHIO'S SYSTEM OF PUBLIC SCHOOL FINANCING

Ohio's statutory scheme for financing public education is complex. At the heart of the present controversy is the School Foundation Program (R.C. Chapter 3317) for allocation of state basic aid and the manner in which the

allocation formula and other school funding factors have caused or permitted to continue vast wealth-based disparities among Ohio's schools, depriving many of Ohio's public school students of high quality educational opportunities.

According to statute, the revenue available to a school district comes from two primary sources: state revenue, most of which is provided through the School Foundation Program, and local revenue, which consists primarily of locally voted school district property tax levies. Federal funds play a minor role in the financing scheme. Ohio relies more on local revenue than state revenue, contrary to the national trend.

Under the foundation program,[1] state basic aid is available for school districts that levy at least twenty mills of local property tax revenue for current operating expenses.[2] R.C. 3317.01(A). State basic aid for qualifying school districts is calculated each biennium as part of the General Assembly's budget pursuant to a formula set forth in R.C. 3317.022.[3]

The "formula amount" has no real relation to what it actually costs to educate a pupil. In fact, Dr. Howard B. Fleeter, Assistant Professor at the School of Public Policy and Management at Ohio State University, stated that

the foundation dollar amount "is a budgetary residual, which is determined as a result of working backwards through the state aid formula after the legislature determines the total dollars to be allocated to primary and secondary education in each biennial budget. Thus, the foundation level reflects political and budgetary considerations at least as much as it reflects a judgment as to how much money *should* be spent on K-12 education." (Emphasis *sic*.)

The foundation formula amount, which was set at $2,817 per pupil in the 1992-1993 school year, 144 Ohio Laws, Part III, 4122, is adjusted by a school district equalization factor, now called the "cost of doing business" factor. R.C. 3317.02(E). These rates of adjustment vary from county to county and apply equally to all districts within the county without regard to the actual costs of operations within the individual school districts. The cost-of-doing-business factor assumes that costs are lower in rural districts than in urban districts.

A target amount of combined local and state aid per district is reached by multiplying the formula amount, the cost-of-doing-business factor and the average daily membership. R.C. 3317.022(A). However, subtracted or "charged off" from that figure is the total taxable value of real and tangible

personal property in the district times a certain percentage. *Id.* Subtracting the applicable charge-off results in a figure constituting basic state aid for the district in question. The effect of an increase in this percentage would be to decrease the amount of basic state aid, resulting in an even greater burden for local schools to fund education through local property and/or income taxes.

The financing scheme is further complicated when special factors are taken into account. For instance, additional appropriations may be made for categorical programs, such as vocational education, special education and transportation. R.C. 3317.024. However, no adjustment is made for the relative wealth of the receiving district. Moreover, children in funded handicapped "units" are not included in the state basic aid formula. R.C. 3317.02(A). Thus, funds for handicapped students, for instance, whose education costs are substantially higher (due to state mandates of small class size and because of related extra services) are disbursed in a flat amount per unit (see R.C. 3317.05). If the actual cost exceeds the funds received, wealthier districts are in a better position to make up the difference.

In addition, school districts with children whose families collect Aid to Dependent Children ("ADC") receive additional distributions which increase according to the concentration of ADC pupils. R.C. 3317.023(B). However, the level of distributions freezes once the concentration reaches twenty percent. R.C. 3317.023(B)(1). Thus, districts with higher concentrations of ADC pupils are forced to carry more of the extra cost. Moreover, testimony revealed that above the twenty-percent concentration level, educational need increases at a faster rate than the concentration percentage.

The School Foundation Program does contain certain guarantees so that a school district receives the greater of the program amount or the guarantee amount. See R.C. 3317.04 and 3317.0212. However, testimony revealed that the guarantees work to the substantial benefit of the wealthier districts and represent a flaw in the system of school funding, because they work against the equalization effect of the formula.

Another weakness in the system is certain "tax reduction factors" introduced into law by the General Assembly's 1976 enactment of R.C. 319.301 in Am.Sub.H.B. No. 920, 136 Ohio Laws, Part II, 3182, 3194. The

purpose of R.C. 319.301, as amended, is to limit growth of real property tax revenues that would otherwise occur as a consequence of inflation of property values.[4] R.C. 319.301 requires the application of tax reduction factors when property values increase due to reappraisal or update. The result is that a school district will receive the same number of dollars from voted tax levies after reappraisal as it did before reappraisal, even though real property valuation in the district has increased through real estate inflation. As a direct result of these tax reduction measures introduced by H.B. No. 920, local revenues cannot keep pace with inflation, and school districts have been required to propose additional tax levies -- most of which ultimately fail.

H.B. No. 920 has also resulted in a phenomenon called "phantom revenue." As already explained, tax reduction factors limit revenue growth that would otherwise occur due to inflation of real property values. However, at the same time, the increased valuation of property is taken into account in the charge-off portion of the foundation formula. R.C. 3317.022(A). Thus, a school district can experience an increase in the valuation of its taxable real

property without enjoying any additional income and yet receive less under the formula because the total taxable value of property has increased.

Another inherent weakness in the system stems from forced borrowing. Districts unable to meet their budgets are forced to borrow funds. The first type of state-mandated loan is the "spending reserve" loan. R.C. 133.301. Under the spending reserve loan program, school districts are permitted to borrow against a subsequent year's revenue with approval of the Superintendent of Public Instruction. *Id.* Although there is a statutory maximum amount that can be borrowed by a school district, the superintendent may (and does) permit borrowing beyond that limit. R.C. 133.301(C).

If a school district cannot meet its current operating needs through a spending reserve loan, it is then required to seek approval of a loan under R.C. 3313.483. These loans are obtained from commercial lenders. R.C. 3313.483(D).

Pursuant to R.C. 3313.483(A), local boards of education in such circumstances declare by resolution that they are unable to remain open for instruction and are unable to meet their expenses. The board must then request

that the State Auditor determine that such a condition exists. *Id.* If the auditor finds that the board has exhausted all available revenue sources, the auditor must certify that finding to the Superintendent of Public Instruction and the State Board of Education and must also certify the amount of operating deficit the district will have at the end of the fiscal year. R.C. 3313.483(B). A school district that has been certified as having a projected operating deficit must apply for a loan from a commercial lender. R.C. 3313.483(D). However, if the commercial loan is denied, a school district must submit a plan for reducing the district's budget. R.C. 3313.483(E)(1). The budget reduction plan must provide for repayment of the loan within two years (ten years for very large amounts), R.C. 3313.483(E)(2), but the plan need not provide for repayment of any spending reserve loan. The loan is repaid by diverting funds otherwise available to the school district under the school foundation program to the commercial lender. R.C. 3313.483(E)(3).

Effective December 1992, if a district receives an R.C. 3313.483 emergency school assistance loan in excess of seven percent of the district's general fund expenditures and has received a loan under R.C. 3313.483 within

the last five years, the district is subject to state supervision under R.C. 3313.488 for that year and the ensuing two years. R.C. 3313.4810. School districts subject to state supervision are prohibited from making any expenditure of money or any employment, purchase or rental contract, giving any order involving the expenditure of money, or increasing any wage or salary schedule without written approval of the superintendent. R.C. 3313.488(A).

The debt which stems from mandated borrowing programs is in many instances staggering, and the cyclical effect of continued borrowing has made it more difficult to maintain even minimal school operations. See R.C. 133.301 and 3313.483. These loan programs, discussed above, are nothing less than a clever disguise for the state's failure to raise revenue sufficient to discharge its constitutional obligations.

The School Foundation Program contains no aid expressly for capital improvements for Ohio's public schools. Aid for that purpose is provided by the Classroom Facilities Act, R.C. Chapter 3318. However, the evidence showed, and the trial court found, that the Act is insufficiently funded to meet the needs of districts that are poor in real property value.

A "THOROUGH AND EFFICIENT SYSTEM OF COMMON SCHOOLS"

In urging this court to strike the statutory provisions relating to Ohio's school financing system, appellants argue that the state has failed in its constitutional responsibility to provide a thorough and efficient system of public schools.[5] We agree.

Section 2, Article VI of the Ohio Constitution requires the state to provide and fund a system of public education and includes an explicit directive to the General Assembly:

"The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State ***."

The delegates to the 1850-1851 Constitutional Convention recognized that it was the state's duty to both present and future generations of Ohioans to establish a framework for a "full, complete and efficient system of public education." II Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51 (1851) ("Debates"). Thus, throughout their discussions, the delegates stressed the

importance of education and reaffirmed the policy that education shall be afforded to every child in the state regardless of race or economic standing. Debates at 11, 13. Furthermore, the delegates were concerned that the education to be provided to our youth not be mediocre but be as perfect as could humanly be devised. Debates at 698-699. These debates reveal the delegates' strong belief that it is the state's obligation, through the General Assembly, to provide for the full education of all children within the state.

Dr. Samuel Kern Alexander, a leading professor in the area of school law and school finance, testified that, in the context of the historical development of the phrase "thorough and efficient," it is the state's duty to provide a system which allows its citizens to fully develop their human potential. In such a system, rich and poor people alike are given the opportunity to become educated so that they may flourish and our society may progress. It was believed by the leading statesmen of the time that only in this way could there be an efficient educational system throughout the state.

This court has construed the words "thorough and efficient" in light of the constitutional debates and history surrounding them. In *Miller v. Korns*

(1923), 107 Ohio St. 287, 297-298, 140 N.E. 773, 776, this court defined what is meant by a "thorough and efficient" system of common schools throughout the state:

"This declaration is made by the people of the state. It calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but state-wide.

"With this very purpose in view, regarding the problem as a state-wide problem, the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state.

"A thorough system could not mean one in which part or any number of the school districts of the state were starved for funds. An efficient system could not mean one in which part or any number of the school districts of the state lacked teachers, buildings, or equipment." (Emphasis added.)

Cincinnati School Dist. Bd. of Edn. v. Walter (1979), 58 Ohio St.2d 368, 387, 12 O.O.3d 327, 338, 390 N.E.2d 813, 825, cited *Miller* with approval.

Additionally, *Walter* recognized that while the General Assembly has wide discretion in meeting the mandate of Section 2, Article VI, this discretion is not without limits. *Id.* *Walter* found that a school system would not be thorough and efficient if "a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity." *Id.*

Other states, in declaring their state funding systems unconstitutional,[6] have also addressed the issue of what constitutes a "thorough and efficient" or a "general or uniform" system of public schools. We recognize that some of these decisions were decided on different grounds or involved different education provisions. Despite these differences, we still are persuaded by the basic principles underlying these decisions.

For instance, in *Edgewood Indep. School Dist. v. Kirby, supra,* 777 S.W.2d 391, the Texas Supreme Court invalidated its state funding structure, in which annual per-student expenditures varied from $2,112 in the poorest districts to $19,333 in the wealthiest districts. The court noted at 393:

"Property-poor districts are trapped in a cycle of poverty from which there is no opportunity to free themselves. Because of their inadequate tax base, they must tax at significantly higher rates in order to meet minimum requirements for accreditation; yet their educational programs are typically inferior. The location of new industry and development is strongly influenced by tax rates and the quality of local schools. Thus, the property-poor districts with their high tax rates and inferior schools are unable to attract new industry or development and so have little opportunity to improve their tax base."

The plaintiffs in *Edgewood* presented compelling evidence of how fiscal inequities produced inadequate educational opportunities. The court in *Edgewood* stated that the inequalities resulting from Texas's school funding system violated the constitutional requirement of efficiency. Thus, the court declared that the legislature must provide for an efficient system in which funds are distributed more equitably. As the court noted, at 397, to correct the deficiencies, "[a] band-aid will not suffice; the system itself must be changed."

The dissent believes that we rely too heavily upon anecdotal evidence to support our holding that the current system is unconstitutional. Glaringly

absent from the dissenting opinion, however, is any consideration of the massive evidence presented to us. There is one simple reason for this noticeable omission. The facts are fatal to the dissent. The dissent wisely recognizes that it could not, in good conscience, address these facts and then conclude that Ohio is providing the opportunity for a basic education. Therefore, it does the only thing that it could do, it ignores them. Instead, it turns to facts outside the record and to laws passed by the General Assembly after this lawsuit was filed as a means of justifying its position.[7] We, however, know that it is imperative to consider the record as presented to us. In doing so, we find that exhaustive evidence was presented to establish that the appellant school districts were starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity.

In 1989, the General Assembly directed the Superintendent of Public Instruction to conduct a survey of Ohio's public school buildings. Section 8, Am.Sub.S.B. No. 140, 143 Ohio Laws, Part I, 837. The purpose of this survey was to determine the cost of bringing all facilities into compliance with state

building codes and asbestos removal requirements, as well as all other state and local provisions related to health and safety. *Id.*

The results of this study were published in the 1990 Ohio Public School Facility Survey. The survey identified a need for $10.2 billion in facility repair and construction.

Among its findings, the survey determined that one-half of Ohio's school buildings were fifty years old or older, and fifteen percent were seventy years old or older. A little over half of these buildings contained satisfactory electrical systems; however, only seventeen percent of the heating systems and thirty-one percent of the roofs were deemed to be satisfactory. Nineteen percent of the windows and twenty-five percent of the plumbing and fixtures were found to be adequate. Only twenty percent of the buildings had satisfactory handicapped access. A scant thirty percent of the school facilities had adequate fire alarm systems and exterior doors.

Over three years after the 1990 survey was published, the current Superintendent of Public Instruction, John Theodore Sanders, averred that his visits to Ohio school buildings demonstrated that some students were "making

do in a decayed carcass from an era long passed," and others were educated in "dirty, depressing places."

Robert Franklin, the Building Assistant Supervisor for the Ohio Department of Education, gave disturbing examples of incidents where the health and safety of students were threatened. In Buckeye Local, Belmont County, three hundred students were hospitalized because carbon monoxide leaked out of heaters and furnaces. In another school district in Wayne County, an elementary school built in 1903 had floors so thin that a teacher's foot went through the floor while she was walking across her classroom.

Another major health and safety hazard is asbestos, which has yet to be removed from 68.6 percent of Ohio's school buildings, in direct violation of a 1987 mandate by the United States Environmental Protection Agency. In fact, over ninety-nine percent of public school structures in Ohio have asbestos in them. Jack D. Hunter, supervisor of school facilities with the Ohio Department of Education, testified that around seventy-five percent of Ohio's public school facilities "have asbestos that should be abated *** either immediately or near-term." For fiscal year 1990, over two hundred forty school districts applied for

$140,000,000 in asbestos-abatement money from the state. Only sixty-three districts received funds.

Other conditions which existed within the appellant school districts were equally deplorable. The Nelsonville York Elementary School in Athens County is sliding down a hill at a rate of an inch per month. The school district has hired a registered surveyor to monitor the building's movement. At Eastern Brown High School, the learning-disabled classroom is a converted storage room with no windows for ventilation; a fan is placed on the floor to provide ventilation. The students at Ash Ridge Elementary eat lunches at their desks because there is no school cafeteria.

In the Dawson-Bryant school system, where a coal heating system is used, students are subjected to breathing coal dust which is emitted into the air and actually covers the students' desks after accumulating overnight. Band members are forced to use a former coal bin for practice sessions where there is no ventilation whatsoever, causing students to complain of headaches. Special education classes are also held in a former closet that has one bare lightbulb hanging from the ceiling.

Deering Elementary is not handicapped accessible. The library is a former storage area located in the basement. Handicapped students have to be carried there and to other locations in the building. One handicapped third-grader at Deering had never been to the school library because it was inaccessible to someone in a wheelchair.

The Northern Local School District in Perry County has also been plagued with deteriorating facilities, which include bulging bricks and walls which bow out at the now closed Somerset Elementary School, leaking roofs and windows, outdated sewage systems which have actually caused raw sewage to flow onto the baseball field at Sheridan High School, and the presence of arsenic in the drinking water in the Glenford Elementary School buildings.

Equally alarming are the conditions found in the Southern Local School District in Perry County, where buildings are crumbling and chunks of plaster fall from the walls and ceiling. In fact, the problem was so severe that the principal and custodians at Miller Junior High at Shawnee deliberately knocked

plaster off the ceilings so that the plaster would not fall on the students during the day.[8]

Appellant Christopher Thompson poignantly described his experience growing up in this school district. While Chris attended New Straitsville Elementary School in Perry County, plaster was falling off the walls and cockroaches crawled on the restroom floors. Chris said the building gave him a "dirty feeling" and that he would not use the restroom at school because of the cockroaches. In subsequent years, Chris had to contend with a flooded library and gymnasium, a leaky roof where rainwater dripped from the ceiling like a "waterfall," an inadequate library, a dangerously warped gymnasium floor, poor shower facilities, and inadequate heating. In fact, due to construction and renovation of the heating system, when Chris attended high school, there was no heat from the beginning of the fall of 1992 until the end of November or beginning of December. Students had to wear coats and gloves to classes and were subjected to kerosene fumes from kerosene heaters which were used when the building became very cold.

Obviously, state funding of school districts cannot be considered adequate if the districts lack sufficient funds to provide their students a safe and healthy learning environment.

In addition to deteriorating buildings and related conditions, it is clear from the record that many of the school districts throughout the state cannot provide the basic resources necessary to educate our youth. For instance, many of the appellant school districts have insufficient funds to purchase textbooks and must rely on old, outdated books. For some classes, there were no textbooks at all. For example, at Southern Local during the 1992-1993 school year, none of the students in a Spanish I class had a textbook at the beginning of the year. Later, there was a lottery for books. Students who picked the lucky numbers received a book.

The accessibility of everyday supplies is also a problem, forcing schools to ration such necessities as paper, chalk, art supplies, paper clips and even toilet paper. A system without basic instructional materials and supplies can hardly constitute a thorough and efficient system of common schools throughout the state as mandated by our Constitution.

Additionally, many districts lack sufficient funds to comply with the state law requiring a district-wide average of no more than twenty-five students for each classroom teacher. Ohio Adm.Code 3301-35-03(A)(3). Indeed, some schools have more than thirty students per classroom teacher, with one school having as many as thirty-nine students in one sixth grade class. As the testimony of educators established, it is virtually impossible for students to receive an adequate education with a student-teacher ratio of this magnitude.

The curricula in the appellant school districts are severely limited compared to other school districts and compared to what might be expected of a system designed to educate Ohio's youth and to prepare them for a bright and prosperous future. For example, elementary students at Dawson-Bryant have no opportunity to take foreign language courses, computer courses, or music or art classes other than band. Junior high students in this district have no science lab. In addition, Dawson-Bryant offers no honors program and no advanced placement courses, which disqualifies some of the students from even being considered for a scholarship or admittance to some universities. Dawson-

Bryant is not alone -- similar problems were being experienced by each of the appellant school districts.

None of the appellant school districts is financially able to keep up with the technological training needs of the students in the districts. The districts lack sufficient computers, computer labs, hands-on computer training, software, and related supplies to properly serve the students' needs. In this regard, it does not appear likely that the children in the appellant school districts will be able to compete in the job market against those students with sufficient technological training.

Lack of sufficient funding can also lead to poor academic performance. Proficiency tests are a method of measuring education. The ninth grade proficiency test was designed to measure that body of knowledge pupils are expected to have mastered by the ninth grade. R.C. 3301.0710. Passage of the ninth grade proficiency test is required before a student may receive a high school diploma. R.C. 3313.61(A). As of the fall of 1993, thirty-two out of ninety-nine seniors at Dawson-Bryant had not passed all parts of the ninth grade proficiency test. This means that nearly one third of the senior class had

not met basic graduation requirements. The district did not have enough money to pay tutors to assist these students. Poor performance on the ninth grade proficiency tests is further evidence that these schools lack sufficient funds with which to educate their students.

The dissent emphasizes that since schools have complied with minimum standards enacted in 1983, students are being provided with an adequate education. However, in March 1992, the State Superintendent suspended routine minimum standard evaluations. Consequently, these minimum standards have not been regularly enforced since that time.

All the facts documented in the record lead to one inescapable conclusion -- Ohio's elementary and secondary public schools are neither thorough nor efficient. The operation of the appellant school districts conflicts with the historical notion that the education of our youth is of utmost concern and that Ohio children should be educated adequately so that they are able to participate fully in society. Our state Constitution was drafted with the importance of education in mind. In contrast, education under the legislation being reviewed ranks miserably low in the state's priorities. In fact, the

formula amount is established after the legislature determines the total dollars to be allocated to primary and secondary education in each biennial budget. Consequently, the present school financing system contravenes the clear wording of our Constitution and the framers' intent.

Furthermore, rather than following the constitutional dictate that it is the state's obligation to fund education (as this opinion has repeatedly underscored), the legislature has thrust the majority of responsibility upon local school districts. This, too, is contrary to the clear wording of our Constitution. The responsibility for maintaining a thorough and efficient school system falls upon the state. When a district falls short of the constitutional requirement that the system be thorough and efficient, it is the state's obligation to rectify it. See *DuPree v. Alma School Dist. No. 30* (1983), 279 Ark. 340, 349, 651 S.W.2d 90, 95.

Also, when we apply the tests of *Miller* and *Walter* as to what is meant by the words "thorough and efficient," the evidence is overwhelming that many districts are "starved for funds," and lack teachers, buildings, or equipment. These school districts, plagued with deteriorating buildings, insufficient

supplies, inadequate curricula and technology, and large student-teacher ratios, desperately lack the resources necessary to provide students with a minimally adequate education. Thus, according to the tests of *Miller* and *Walter*, it is painfully obvious that the General Assembly, in structuring school financing, has failed in its constitutional obligation to ensure a thorough and efficient system of common schools. Clearly, the current school financing scheme is a far cry from thorough and efficient. Instead, the system has failed to educate our youth to their fullest potential.

In so finding, we reject appellees' contention that *Walter* is controlling. The equal yield formula challenged in *Walter* was repealed shortly after the case was decided. See former R.C. 3317.022 as amended by Am.Sub.S.B. No. 221, 137 Ohio Laws, Part I, 581, and repealed by Am.Sub.S.B. No. 59, 138 Ohio Laws, Part I, 188, 200, 230. Moreover, *Walter* involved a challenge to only one aspect of school funding. In contrast, the case at bar involves a wholesale constitutional attack on the entire system. Additionally, in creating the funding system at issue in *Walter*, the General Assembly had relied on a determination of a legislative committee that the statutorily guaranteed amount

actually was sufficient to provide a high quality education. *Id.*, 58 Ohio St.2d at 372, 12 O.O.3d at 329, 390 N.E.2d at 817. Here, however, the evidence clearly indicates that the funding level set by today's School Foundation Program has absolutely no connection with what is necessary to provide each district enough money to ensure an adequate educational program. The system in place today differs dramatically from that in place nearly twenty years ago; thus, our holding in *Walter* does not control the outcome in this case.

We also reject the notion that the wide disparities in educational opportunity are caused by the poorer school districts' failure to pass levies. The evidence reveals that the wide disparities are caused by the funding system's overreliance on the tax base of individual school districts. What this means is that the poor districts simply cannot raise as much money even with identical tax effort. For example, total assessed property valuation in the Dawson-Bryant School District in 1991 was $28,882,580, while Beachwood School District in Cuyahoga County had $376,229,512. (The two districts have about the same number of pupils.)

We recognize that disparities between school districts will always exist. By our decision today, we are not stating that a new financing system must provide equal educational opportunities for all. In a Utopian society, this lofty goal would be realized. We, however, appreciate the limitations imposed upon us. Nor do we advocate a "Robin Hood" approach to school financing reform. We are not suggesting that funds be diverted from wealthy districts and given to the less fortunate. There is no "leveling down" component in our decision today.

Moreover, in no way should our decision be construed as imposing spending ceilings on more affluent school districts. School districts are still free to augment their programs if they choose to do so. However, it is futile to lay the entire blame for the inadequacies of the present system on the taxpayers and the local boards of education. Although some districts have the luxury of deciding where to allocate extra dollars, many others have the burden of deciding which educational programs to cut or what financial institution to contact to obtain yet another emergency loan. Our state Constitution makes the

state responsible for educating our youth. Thus, the state should not shirk its obligation by espousing cliches about "local control."

We recognize that money alone is not the panacea that will transform Ohio's school system into a model of excellence. Although a student's success depends upon numerous factors besides money, we must ensure that there is enough money that students have the chance to succeed because of the educational opportunity provided, not in spite of it. Such an opportunity requires, at the very least, that all of Ohio's children attend schools which are safe and conducive to learning. At the present, Ohio does not provide many of its students with even the most basic of educational needs.

Since the filing of this lawsuit, the General Assembly has scrambled to enact new laws to soften the blow of the failing system. For instance, beginning in 1992, "equity funds" were provided to supplement distributions under the funding system to those districts with low property valuations and low income. R.C. 3317.0213 and 3317.0214 (Sub.H.B. No. 671, 144 Ohio Laws, Part IV, 6062, effective 6-30-92). In addition, funds were appropriated for technology grants to assist poorer school districts in purchasing computer

equipment. *Id.* at Section 4. However, appropriations for computers are meaningless when school systems cannot use the equipment due to asbestos, faulty electrical wiring, or the lack of teachers. While these programs and funds are desperately needed, they simply are insufficient to get the job done and do not rectify the serious problems inherent in Ohio's financing scheme.

School funding has been, and continues to be, a Herculean task. As thirty-seven lawmakers concede in their *amicus curiae* brief, despite their recent efforts, the General Assembly has not funded our public schools properly. They assert that unless this court rules in favor of the appellants, the urgency of resolving public school funding will quickly fade. We find that this brief eloquently expresses the helplessness felt even by many of our state legislators.

CONCLUSION

We know that few issues have the potential to stir such passion as school financing. In many districts in this great state of ours, students and teachers must fight a demoralizing uphill battle to make the system work. All parties concede that the current system needs to be reformed.

By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio's public school financing scheme must undergo a complete systematic overhaul. The factors which contribute to the unworkability of the system and which must be eliminated are (1) the operation of the School Foundation Program, (2) the emphasis of Ohio's school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings. The funding laws reviewed today are inherently incapable of achieving their constitutional purpose.

We therefore hold that Ohio's elementary and secondary public school financing system violates Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state. The following specific provisions are unconstitutional:

(a) R.C. 133.301, granting borrowing authority to school districts;

(b) R.C. 3313.483, 3313.487, 3313.488, 3313.489, and 3313.4810, the emergency school assistance loan provisions;

(c) R.C. 3317.01, 3317.02, 3317.022, 3317.023, 3317.024, 3317.04, 3317.05, 3317.051 and 3317.052, the School Foundation Program.

(d) R.C. Chapter 3318, the Classroom Facilities Act, to the extent that it is underfunded.

REMEDY

Although we have found the school financing system to be unconstitutional, we do not instruct the General Assembly as to the specifics of the legislation it should enact.[9] However, we admonish the General Assembly that it must create an entirely new school financing system. In establishing such a system, the General Assembly shall recognize that there is but one system of public education in Ohio. It is a statewide system, expressly created by the state's highest governing document, the Constitution. Thus, the establishment, organization and maintenance of public education are the state's responsibility. Because of its importance, education should be placed high in the state's budgetary priorities. A thorough and efficient system of common

schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner, in compliance with all local, state, and federal mandates.

We recognize that a new funding system will require time for adequate study, drafting of the appropriate legislation and transition from the present scheme of financing to one in conformity with this decision. Therefore, we stay the effect of this decision for twelve months.

Appellants are entitled to recover against the state their attorney fees and costs as found by the trial court. *Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, 160, 648 N.E.2d 488, 490.

The court of appeals' judgment is reversed. We remand this cause to the trial court with directions to enter judgment consistent with this opinion. The trial court is to retain jurisdiction until the legislation is enacted and in effect, taking such action as may be necessary to ensure conformity with this opinion.[10]

Judgment reversed

and cause remanded.

DOUGLAS, RESNICK and PFEIFER, JJ., concur and concur separately.

MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., dissent.

Footnotes:

1 The current version of the School Foundation Program is contained in R.C. 3317.01 *et seq.* The School Foundation Program for allocation of state aid has operated in a similar manner from 1981 through the present day despite numerous amendments. The statutory provisions at issue are those that were in existence in January 1992 at the time the amended complaint was filed.

2 A mill is one tenth of a cent. The required twenty mills of local tax includes unvoted or "inside" millage (that portion of the total available ten-mills of unvoted property tax authorized by Section 2, Article XII of the Ohio Constitution that may be levied by a school district) and voted or "outside" millage approved by the voters. The appellant school districts have all participated in the School Foundation Program.

3 The formula was as follows: (school district equalization factor X the formula amount X ADM) - (.02 X total taxable value) = state aid. Former R.C. 3317.022(A). Am.Sub.H.B. No. 298, 144 Ohio Laws, Part III, 3987, 4122.

The basic state aid calculation remains essentially the same in the current version of R.C. 3317.022(A).

4 Inside millage (millage levied without the approval of the electorate and limited to a ten-mill ceiling on unvoted property taxes), new construction growth and, of course, tangible personal property are not subject to tax reduction factors.

5 Appellants also contend that education is a fundamental right and that the current funding system violates equal protection. They further argue that the school financing system violates Section 3, Article VIII and Section 4, Article XII. However, since we decide that Ohio's school financing system violates the Thorough and Efficient Clause of our state Constitution, we decline to address appellants' other constitutional claims.

6 The following states have declared their school funding statutes unconstitutional: *Roosevelt Elementary School Dist. v. Bishop* (1994), 179 Ariz. 233, 877 P.2d 806; *DuPree v. Alma School Dist. No. 30* (1983), 279 Ark. 340, 651 S.W.2d 90; *Serrano v. Priest* (1976), 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929; *Horton v. Meskill* (1977), 172 Conn. 615, 376 A.2d 359;

Rose v. Council for Better Edn. (Ky.1989), 790 S.W.2d 186; *McDuffy v. Secy., Executive Office of Edn.* (1993), 415 Mass. 545, 615 N.E.2d 516; *Helena Elementary School Dist. No. 1 v. State* (1989), 236 Mont. 44, 769 P.2d 684; *Abbott v. Burke* (1990), 119 N.J. 287, 575 A.2d 359; *Tennessee Small School Sys. v. McWherter* (Tenn.1993), 851 S.W.2d 139; *Edgewood Indep. School Dist. v. Kirby* (Tex.1989), 777 S.W.2d 391; *Brigham v. State* (Vt.1997), ___ A.2d ___, 1997 WL 51794; *Seattle School Dist. No. 1 of King Cty. v. State* (1978), 90 Wash.2d 476, 585 P.2d 71; *Pauley v. Kelley* (1979), 162 W.Va. 672, 255 S.E.2d 859; *Washakie Cty. School Dist. One v. Herschler* (Wyo.1980), 606 P.2d 310.

7 In *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus, we held that a reviewing court may not rely upon matters outside the record in deciding the appeal. Contrary to this holding, the dissent relies upon a nationwide survey of test results which was not part of the record. Since the dissent finds this way of proceeding acceptable, we feel at liberty to point out the stark reality of Ohio's plight. A June 1996 survey conducted by the United States General Accounting Office

demonstrates the woeful lack of progress in Ohio's schools. The report notes that ninety-five percent of Ohio's schools reported a need to upgrade or repair buildings to good overall condition. School Facilities: Profiles of School Condition by State, A Report to Congressional Requesters by the General Accounting Office (June 1996) 143. In 1993-1994, Ohio spent an average of only $38 per student for K-12 school facilities. *Id.* Additionally, Ohio ranked last in the number of students per computer among the fifty states. School Facilities: America's Schools Not Designed or Equipped for 21st Century, A Report to Congressional Requesters by the General Accounting Office (Apr.1995) 43.

8 In late 1990, the Southern Local School District was successful in obtaining Classroom Facilities Act funds and passed a tax levy and a bond issue to help construct new facilities. However, the trial court found that even after the completion of the project in 1993, significant problems will remain. The project will not address all the district's outstanding needs, and the building assistance program will not provide operating and maintenance funds to keep the facilities in good working order.

9 The dissent faults us for failing to provide specific guidelines for the General Assembly to follow. However, we recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the clearly legislative function of deciding what the new legislation will be.

10 We grant plenary jurisdiction to the trial court to enforce our decision. This authority includes the right to petition this court for guidance, if the need arises.